86-749

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY,
Petitioner,

v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
OF EDUCATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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November 1986

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QUESTIONS PRESENTED

1. Does a state university board of trustees have standing to seek an injunction against racial discrimination by another state agency, on behalf of its students and faculty, or in order to fulfill its own constitutional obligation to refrain from racial discrimination?

2. Did the Court of Appeals err in reaching the issue of petitioner's standing once it had affirmed the relief sought by petitioner on the basis of the unquestioned standing of another party.

PARTIES IN THE COURT BELOW

The parties in the Court of Appeals below were the State Board of Education, its members, and the State Superintendent of Education, appellants, and the Board of Trustees of Alabama State University, the Knight intervenors, and the United States, appellees.*

The proceeding in the Court of Appeals was an appeal from a preliminary injunction in a desegregation case. The desegregation case in chief involves many additional parties who took no part in the injunction proceedings or the injunction appeal. The parties in the case in chief are set forth in the footnote.**

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* The members of the Board of Trustees of Alabama State University are Richard Arrington, Jr., A.A. Chandler, Ross Dunn, Larue Harding, Andrew M. Hayden, Lillian Ann Hope, Patsy B. Parker, Joe L. Reed, James A. Smith, and Frankye Underwood. The Knight intervenors are John F. Knight, Catherine Coleman, Charles R. Anderson, Alma S. Freeman, John T. Gibson, Susan Buskey, Carl Petty, Tamara L. Knight, and Dennis C. Barnett. The members of the State Board of Education are John M. Tyson, Jr., Isabelle B. Thomason, John L. Fulmer, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., Evelyn Pratt, and Nolan Williams. The State Superintendent of Education is Wayne Teague.

** This case was filed by the United States against the State of Alabama, its public colleges and universities. and certain state

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agencies and officials. The lineup of parties has been changed by realignment and intervention. After the changes, the lineup in the district court is as follows:

The plaintiffs are the United States; the Board of Trustees of Alabama State University and its members (originally sued as defendants and later realigned as plaintiffs); the Board of Trustees of Alabama A & M University and its members (also originally sued as defendants and realigned as plaintiffs); and the Knight intervenors.

The defendants are the State of Alabama; the Governor (George Wallace); the State Superintendent of Education (Wayne Teague); the State Comptroller (Thomas Braswell); the State Finance Director (Sid McDonald); the State Board of Education and its members; the Alabama Commission on Higher Education and its members; the Alabama Public School and College Authority and its members; and the following state colleges and universities (and in some cases the members of their Boards of Trustees): University of Alabama, Auburn University, Jacksonville University, Livingston University, University of Montevallo, University of North Alabama, University of South Alabama, and Troy State University.

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No. 86-

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v.

ALABAMA STATE BOARD OF EDUCATION; and
WAYNE TEAGUE, STATE SUPERINTENDENT
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

This petition arises out of an appeal from a preliminary injunction which was sought by three of the plaintiffs (including this petitioner) against one of the defendants in a desegregation case. The Court of Appeals held that this petitioner was not entitled to seek the injunction or any other relief in this case (although the court then proceeded to affirm the injunction insofar as it was sought by the two other plaintiffs). Because the decision below may cripple the ability of the petitioner to carry out its constitutional obligations and to represent the interests of its present and prospective students and faculty in the continuing case in chief or in any other litigation, this petition should be granted even though the specific injunction which the petitioner sought is still in effect on the motion of other parties.

CITATIONS TO OPINIONS BELOW

The decision of the Court of Appeals is reported at 791 F.2d 1450 (11th Cir. 1986), and is reprinted in this Petition at 1a. The order denying rehearing is likewise reported at 791 F.2d 1450 (11th Cir. 1986), and is reprinted at 31a. The district court proceedings are unreported. Its Preliminary Injunction is reprinted at 24a; its Order amending the preliminary injunction is reprinted at 28a; and its Memorandum Opinion is reprinted at 17a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1986. A timely petition for rehearing was denied on July 10, 1986. On September 29, 1986, Justice Powell extended the time for filing this petition to November 7, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause (Art. VI, Sec. 2 of the Constitution):

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Equal Protection Clause (14th Amendment, Sec. 1):

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[1] After the district court granted the preliminary injunction involved in this petition, it proceeded to the merits of the case and decided the issue of liability. 628 F.Supp. 1137 (N.D. Ala. 1985), appeal pending.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Title VI, Civil Rights Act of 1964 (42 U.S.C. § 2000d):

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

The United States sued the State of Alabama, various state education agencies and officials, and all the four-year public colleges and universities in the State, including this petitioner, the Board of Trustees of Alabama State University, a historically black university in Montgomery. The essential claim was that the defendants maintain a state system of higher education which discriminates on account of race, and that they should be required to desegregate the system fully.

The Board of Trustees of Alabama State University, agreeing with the contentions of the United States, recognizing its constitutional obligation to avoid racial discrimination, and wishing to be free to challenge rather than to participate in acts of discrimination, moved to be realigned as party plaintiff rather than defendant. The motion was granted, along with a similar motion filed by the Board of Trustees of Alabama A & M University, another historically black university which had also been sued by the United States. In addition, a

group of private citizens (the Knight intervenors) intervened as plaintiffs representing a class of present and prospective students and employees of Alabama State University and the other Montgomery-area universities.

The liability phase of this case on the merits was tried in July 1985. Shortly thereafter, but before the district court's decision on the merits, one of the defendants, the State Board of Education, voted to decertify (and thus eliminate) certain education programs offered by Alabama State University. Petitioner sought a preliminary injunction on the grounds that the elimination of these programs could interfere with the district court's ability to order an effective remedy for any discrimination that it might find. The Knight intervenors sought similar relief.

The district court held a hearing and granted a preliminary injunction prohibiting the State Board of Education and the State Superintendent of Education from eliminating the programs in question.

The State Board of Education and the State Superintendent of Education appealed the preliminary injunction, both on the merits and on the ground that the Board of Trustees of Alabama State University does not have the capacity to bring a suit against its creator the State or against a state agency.

On appeal, the Court of Appeals upheld the preliminary injunction based on the motion of the Knight intervenors, whose standing was unchallenged. Despite having affirmed the injunction on the basis of one party's standing, however, the Court of Appeals also addressed the issue of petitioner's standing, and held that the Board of Trustees of Alabama State University had no standing to seek the injunction. The Court of Appeals therefore affirmed the preliminary injunction "on behalf of"

the Knight intervenors, and reversed it "on behalf of" the petitioner.[2] 15a.

In reaching its decision, the Court of Appeals relied on a line of cases in this Court and in the former Fifth Circuit which, it said, "stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." 4a. The panel did not address the argument that the Board of Trustees of Alabama State University could raise claims either as a representative of its students and faculty, or in pursuance of the Board members' obligation to carry out their own oaths of office to obey the Constitution as the Supreme Law of the Land. It cited none of the cases in other circuits which have explicitly held that a school board or school district may raise such claims; it did not address, except in passing in a footnote, this Court's decision in *Board of Education v. Allen*, 392 U.S. 236 (1968); and its sole discussion of this Court's decision in *State of Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), was a footnote which made that case sound strikingly similar to the instant case.[3]

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[2] The Court of Appeals modified the injunction slightly because of the Eleventh Amendment's prohibition against suing a state. The injunction was allowed to run against the named officials but not against the State Board of Education.

[3] When the district court decided the merits of the case (liability phase), shortly after its entry of the preliminary injunction, it addressed the standing of the petitioner:

> "The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Seattle, Washington School Board—no less a creature of the State of Washinton than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amend-

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals' decision is in conflict with decisions of other circuit courts on the same matter, see Supreme Court Rule 17.1(a), and is in conflict with applicable decisions of this Court. See Supreme Court Rule 17.1(c).

I. The Court of Appeals erred in holding that Petitioner had no standing to seek the preliminary injunction.

The Court of Appeals held that the Board of Trustees of Alabama State University could not request relief against the State of Alabama or any state agencies or state officials. The panel relied upon a line of cases holding that in general disputes between arms or creatures of a State do not implicate federal rights.[4] In none of those cases, however, was there an argument—or a situation calling for such an argument—that the state-created entity making the claim was doing so on behalf of persons who indisputably have federal rights, or was doing so in pursuit of its own obligation under the Supremacy Clause to conform its conduct to the federal Constitution or a federal statute.

Where such an argument *has* been made, state-created entities or members of boards of state-created entities have uniformly been allowed to sue to enforce the equal

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ment by the challenged legislative action. The dissent by Justice Powell never once suggests that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983." [628 F.Supp. at 1172.]

[4] The cases cited by the Court of Appeals were: *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburg*, 207 U.S. 161 (1907). 4a.

protection clause and similar constitutional or statutory provisions. This has been the rule in other Courts of Appeals, whose contrary decisions were not cited by the court below, and it has been the rule in this Court.

Many of the decisions came, as might be expected, in school desegregation cases. In 1956, the Eighth Circuit recognized the standing of a local school board and its members to sue to allow them to carry out their obligation to obey the Constitution:

> "[P]laintiffs are under a duty to obey the Constitution . . . It follows as a necessary corollary that they have a federal right to be free from direct and deliberate interference with the performance of the constitutionally imposd duty. The right arises by necessary implication from the imposition of the duty as clearly as though it has been specifically stated in the Constitution." [*Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 99 (8th Cir. 1956).

The Sixth Circuit has applied this reasoning explicitly to hold that a local school board has standing under the Supremacy Clause to challenge action by the State which threatens the local board's efforts to desegregate. In *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 412 U.S. 932 (1974), the plaintiff school board sought to challenge on constitutional grounds a proposed transfer of a portion of its territory to an adjoining school district. The board argued. *inter alia*, that the transfer threatened to interfere with its duty to desegregate. The court found that the board had standing based upon several different grounds, among them the Supremacy Clause:

> [T]he Akron Board and its Superintendent have been commanded by action of the state board to participate in conduct leading in the direction of segregation of its school system. Such conduct would place the Board and its members and its Superintendent in the position of violating the Fourteenth Amend-

> ment to the United States Constitution. It would subject plaintiffs to being defendants in a suit to restrain conduct which they appear to abhor and which they avow to be unconstitutional. At least theoretically it might subject individual members of the Board and the Superintendent to suits for damages under the Civil Rights Act. 42 U.S.C. § 1983.

Id. at 1290.

Similar reasoning has led this Court to recognize a school board's standing to challenge state laws and policies that the board believes will interfere with its duty to support the Constitution:

> Appellees do not challenge the standing of appellants [a local school board and its members] to press their claim in this Court. Appellants have taken an oath to support the United States Constitution. Believing [the relevant state law provisions] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law]—that would be likely to bring their expulsion from office and also a reduction of state funds for their school districts. There can be no doubt that appellants thus have a "personal stake in the outcome" of this litigation.

Board of Education v. Allen, 392 U.S. 236, 241 n.5 (1968) (citations omitted).

The same rule has been applied in many other cases. *See Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Board of School Directors of Milwaukee v. Wisconsin*, No. 84-C-0877, slip op. at 16-19, 22-23 (E.D. Wis. April 29, 1985); *Liddell v. Board of Education of St. Louis*, 491 F.Supp. 351 (E.D. Mo. 1981); *Black v. Missouri*, No. 77-0420-CV-W-3, slip op. at 11-12 (W.D. Mo. June 1, 1981); *Evans v. Buchanan*, 379 F.Supp. 1218, 1219 (D. Del. 1974); *Bradley v. School Board of Richmond*, 338 F.Supp. 67 (E.D. Va.) *rev'd on other grounds*, 462 F.2d 1058 (4th

Cir. 1972), *aff'd by equally divided court*, 412 U.S. 92 (1973) (per curiam).

The above principles apply fully in this case. The Supremacy Clause obligates the trustees to abide by the Constitution of the United States, and violation of that obligation subjects the Board of Trustees to suit, which is precisely what happened here. The decision of the Court of Appeals does not leave the Board of Trustees as a passive observer on the sidelines, but presumably restores it to the status of defendant, where the constitutional dilemma returns.

The lower court's holding is also contrary to this Court's recent decision in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1981), which conferred Fourteenth Amendment standing on a local school board to challenge a statewide initiative that divested local boards of their ability to use busing in order to desegregate district schools. The decision below dealt with *Seattle* in a footnote, asserting that the case could be "harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator" because the Supreme Court's decision "does not trench on a state's political prerogatives." 7a n.5. With all due respect, petitioners believe the Court of Appeals' analysis of *Seattle* was in error because this Court's opinion offers no basis for distinguishing between the situation of the Seattle school board and the Board of Alabama State University.

More recently, this Court has again decided a case in which school districts were among the plaintiffs. *Papasan v. Allain*, 106 S.Ct. 2926 (1986). The *Seattle* and *Papasan* decisions are not novel. They are in accord with the weight of authority recognizing that school boards may sue to enforce the Fourteenth Amendment rights of their students. *See, e.g., Akron Board of Education*, 490 F.2d at 1290-91; *Little Rock School District v. Pu-*

laski County School District No. 1, 584 F.Supp. 328, 352, *aff'd*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 2926 (1986); *Liddell v. Board of Education of St. Louis*, No. 72-100C(4), slip op. at 1-2 (E.D. Mo. Sept. 24, 1981); *Bradley v. School Board of Richmond*, 338 F.Supp. at 230; *Bradley v. School Board of Richmond*, No. 2253-R, slip op. at 1 (E.D. Va. Aug. 31, 1984).

The fact that the interests asserted by ASU's trustees include those of the students, faculty, and other employees of the school is not unusual. Where there is a close relationship between the plaintiffs who seek to bring an action and the class of persons whose constitutional or statutory rights are claimed to be violated, standing to sue has frequently been found. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) (right of an organization to defend its members' constitutional rights); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of school to protect the constitutional rights of its pupils and their parents).

The presence in the case of other parties with standing who have thus far pressed similar claims—the United States and the Knight intervenors—is also no reason to bar ASU's or its individual trustees' standing, because there is no guarantee that the interests petitioners assert can or will be fully represented by the other parties.[5] Courts have recognized that school boards are often best able to represent the interests of their students. Inadequate resources, lack of familiarity with complex issues

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[5] This Court has frequently been confronted with cases in which a party, although it has standing, is not in a position to present the issues in the manner necessary for decision. This has been true in cases involving the United States, *e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983), or a State, *e.g., Swarb v. Lennox*, 405 U.S. 191 (1972), or private parties. *E.g., Bailey v. Patterson*, 369 U.S. 31 (1962); *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982).

involving education programs, and an inability to portray institutional interests (especially long-range, institutional characteristics which will affect prospective students) may leave students and their parents at a disadvantage and warrant representation by a school board. *See e.g., Akron Board of Education,* 490 F.2d at 1289-90. This Court has recognized that a plaintiff may represent the rights of third parties even where no obstacles prevent third party assertion of their own rights, where the interests of such individuals are "inextricably bound up with" the rights that the plaintiff wishes to pursue. *See, e.g., Singleton v. Wulff,* 428 U.S. 106, 114, 116 (1975).[6]

II. The Court of Appeals erred in reaching the question of Petitioner's standing once it had found another party who had obtained the same relief and who had unquestioned standing.

Finally, petitioner believes it was error for the Court of Appeals even to reach the issue of petitioner's standing. There were already other parties before the court who unquestionably had standing to defend the preliminary injunction. Where one party has standing, this Court has consistently held that the standing of other parties is not to be considered. *See, e.g., Secretary of the Interior v. California,* 464 U.S. 312, 319 n.3 (1984); *Watt v. Energy Action Educational Foundation,* 454 U.S. 151, 160 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 264 & n.9

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[6] Petitioners believe the arguments set forth here apply both to the claims under the Fourteenth Amendment and under Title VI. It may be, however, that assertion of a statutory claim pursuant to Title VI is appropriate even if constitutional standing is lacking. The courts have often found standing to sue under a statute while holding that the same party lacks standing to sue directly under the Constitution. *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979); *Aguayo v. Richardson, supra*; *Compare Metropolitan Life Ins. Co. v. Trafficante,* 409 U.S. 205 (1972).

(1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). In such circumstances a court should avoid deciding questions like this. *E.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

The decision below, far from being simply a harmless opinion, was a judgment, 29a, and it can have mischievous consequences. In all likelihood, this case will go through further proceedings and further questions about petitioner's role will probably be raised. Those questions should be decided based on the circumstances and procedural posture in which they arise, but the decision below, if left standing, may make that difficult. The result could be to decide concrete questions on the basis of the Court of Appeals' abstract rule—the antithesis of what Article III requires. In analogous circumstances, where cases have become moot on appeal, this Court has traditionally intervened by vacating judgments to avoid "spawning any legal consequences." *United States v. Munsingwear Corp.*, 340 U.S. 36, 41 (1950). See also, *e.g., Allen v. Ellisor*, 454 U.S. 807 (1981).

Petitioner believes that the decision of the court below should be reviewed by this Court and reversed, but if this Court believes that it was simply inappropriate for the Court of Appeals to reach the question of petitioner's standing, it may summarily vacate that portion of the lower court's decision, without granting plenary review.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the case set for briefing and argument. In the alternative, the writ of certiorari should be granted and the decision below should be summarily vacated in part insofar as it ruled on petitioner's standing or capacity to sue.

Respectfully submitted,

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November 1986

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

v.

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, STATE SUPERINTENDENT OF EDUCATION,
Defendants-Appellants.

June 6, 1986

Appeal from the United States District Court
for the Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD *, Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d et seq. (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were

severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolution of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory—that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983, or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction

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[1] In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d

sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, *e.g.*, *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); and *Hunter v. City of Pittsburg*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that

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896] (1982), the Seattle, Washington School Board—no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama—sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

"public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation—which would bar any suit by a creature of the state against its creator—has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the *Hunter* line—including *Safety Harbor*, *supra*—and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by

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[2] *Cf. City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir. 1973); P. Bator et al., Hart and Wechsler's The Federal Courts

the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determinaiton has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra*, 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *See also Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1977), they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to

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and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

[3] By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, —— U.S. ——, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

> make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir. 1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

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[4] *See also Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n.3 (3rd Cir. 1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5] *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers, supra*, 588 F.2d at 1070. But *Seattle School District* does not trench

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We continue that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985), *cert. denied sub nom. Grimmer v. Harris*, —— U.S. ——, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Con-

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on a state's political prerogatives. It simply holds that once a state's political organization is in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District, supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

[6] We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, it necessarily has no Title VII rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

[7] *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

gressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our analysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[8] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, —— U.S. ——, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of these first two exceptions. Alabama has not consented to suit

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[8] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was

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[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the *Young* exception applies similarly in both cases.

an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra*, 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which

version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ. P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir.1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir.1965). In short we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—

is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors

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[10] To a secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, 569 F.2d at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services*, —— U.S. ——, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education programs is left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be non-existent.[11]

Given this finding by the lower court, which is entitled to substantial deference, *see Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

in the statewide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacites. We REVERSE the district court's en v of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominantly black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir.1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 21, 1985]

MEMORANDUM OF OPINION ON MOTIONS OF ALABAMA STATE UNIVERSITY AND THE KNIGHT CLASS FOR PRELIMINARY INJUNCTION [1]

By appropriately filed motions for preliminary injunctive relief, plaintiffs Alabama State University ("ASU") and the Knight intervenors ("the Knight class") complain of the failure of the State Board of Education

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[1] This Memorandum Opinion supplements the oral findings of fact and conclusions of law dictated into the record at the end of the evidentiary hearing.

("the Board") to approve, at its August 8, 1985 meeting, any of the ASU undergraduate teacher education programs and fifteen (15) of its thirty-seven (37) graduate teacher education programs.

Current Board approval of these programs, which is a condition of continued regional and professional accreditation of ASU, expires on September 9, 1985. The Court concludes, based on the evidence adduced at a hearing on the motion, that the Board's failure to approve those ASU programs recommended by the Board's staff was retaliatorily based on the punitive consideration that ASU is involved as a plaintiff in this and another lawsuit against the board;[2] and with respect to four other programs not recommended by the staff of the Board, preliminary injunctive relief is essential to preserve the *status quo* pending a determination of the issues in the case in chief.

A brief background review is helpful to an understanding of the issues presented by the instant motions. In the summer of 1983, the United States filed this action against the State of Alabama, the state's senior colleges and universities, the Board of Education and superintendent, among others, claiming that the defendants have operated a dual system of higher education in Alabama and that its vestiges have not been eliminated. Subsequently, the predominately black schools, ASU and Alabama A & M University, were granted leave to realign themselves as plaintiffs and to assert claims against certain other defendants.

ASU has claimed that the Board's requirements for approval of various teacher education programs, particularly the faculty experience requirements for the Class A and Class AA Superintendent and General Su-

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[2] *Margaret T. Allen, et al., vs. The Alabama State Board of Education, et al.*, Civil Action Number 81-697-N (M.D. Ala., August 13, 1985).

pervisor programs, have the purpose and effect of discriminating against the traditionally black schools and black students. These issues have been severed from the main case; and they will be tried in the early part of next year.

The evience at the trial in chief establishes that prior to 1965, ASU was the only state supported, degree granting, senior institution of higher learning in Montgomery, Alabama. ASU's primary mission, as defined by the state legislature has historically involved the training of teachers. Since 1965, two additional institutions have sprung up in Montgomery: Auburn University at Montgomery ("AUM") and Troy State University in Montgomery ("TSUM"). These institutions offer the same kinds of teaching training programs as those offered by ASU.

ASU has remained virtually all-black in terms of student enrollment and its faculty is over 80% black; AUM and TSUM have predominately white student enrollments and largely white faculties. At issue in the case in chief is whether these separate programs are unnecessarily duplicative, and, if so, what relief is appropriate.

Following the filing of post-trial briefs and proposed findings, the liability issues in the main case will be taken under submission in the fall of 1985. Trial commenced on July 1, 1985; and it was completed on August 2, 1985.

Pursuant to policies adopted by the Board in 1979, Class A and Class AA superintendent programs require that at least two of the faculty members have earned doctorate degrees and three years of experience as a superintendent. Class A and Class AA general supervisor programs require similar degrees and three years of experience as a supervisor. The existing education faculty at ASU generally lacks the experience requirement;

and as stated earlier, ASU contends that the requirement has a racially discriminatory purpose and effect.

When the Board's Review Team studied ASU's education programs in 1980, its faculty lacked the specified experience. No binding recommendation was made by the Review Team in that year. Four years later, based on the lack of faculty with the specified experience, the Review Team made a binding recommendation that, *inter alia*, the Class A and Class AA Superintendent and the Class A and Class AA General Supervisor programs at ASU not be approved "until the faculty standards are met."

The faculty experience standard, based on the evidence, is of uncertain origin and intent. Its interpretation is susceptible to arbitrary results. With respect to superintendent programs, the evidence tends to indicate that the requirement disproportionately affects black faculty and institutions.

It was not shown to the Court that the failure to implement the faculty experience requirement will significantly impact on the quality of the teacher education programs offered by the various state institutions.

Under these circumstances, justice is best served by restraining compliance with the faculty experience standard pending the trial of this issue on the merits. Leaving the institutions' education programs in place insures, at the very least, that if the faculty experience requirement is subsequently found to be racially discriminatory in purpose or effect, appropriate relief can be granted by the Court.

At the August 8, 1985 meeting of the Board, the agenda included *inter alia* the approval of teacher education programs at eight senior colleges and universities in the state, including those of ASU which had been recommended for approval by the staff of the Board. When

the Board reached the ASU matters, one of its members, Dr. Victor Poole, moved that the ASU programs be approved as recommended by the staff. Board member Dr. Evelyn Pratt seconded the motion. At that point, Board member Isabel B. Thomasson indicated that she had some questions. Then Board member Dr. John L. Fulmer, retired superintendent of the public schools of Anniston, Alabama, spoke up:

> I have a comment, that is that . . . Alabama State University, who has lawsuits against this Board—we're approving teacher education programs for them. They're costing us a great deal of money and legal fees and other things and they're trying to lower the standards to get in education and college and here we are automatically approving more programs for them. And they have litigation against us now. I would like to amend the motion to say as long as their litigation is in place that we're not approving any program for them.

Dr. Fulmer's position was echoed by Mrs. Thomasson. After being told by the presiding member, Attorney John M. Tyson, Jr., that it would be improper to deny approval simply because of the lawsuits, Fulmer remained adamant:

> Here we have a university who is down our throats. They're suing us in, I think, two areas. They want to reduce teacher education standards. Our legal department is involved with it, and again we are approving all sorts of programs for them.

Although Fulmer's formal substitute motion to deny approval of all programs died for want of a second, Mrs. Thomasson then raised the question of whether there have been any improvements in ASU's education programs under the Tyson Resolution.[3]

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[3] The Tyson Resolution applies to institutions whose education students have a passing rate of less than sixty percent (60%) on

Without question, the staff of the Board had concluded that ASU had sufficiently complied with the Tyson Resolution prior to the August 8 meeting. In a document entitled, "Summary of Action Taken by Alabama State University In Response to Programs Cited Through The 'Tyson' Resolution," the staff pointed out the steps which ASU had taken to improve the performance of its education students. Staff member Dr. C.C. Baker said to the Board: "We have a report on what has been done. I have this report here today. I can share it with the Board."

The board and the superintendent were obviously not very interested in ASU's plans for and actual improvements in its programs. They pointedly ignored the report and recommendation of the staff, and postponed action on approving the recommended programs under the guise of needing additional information.

Reliance on the Tyson Resolution by the board for its failure to approve the staff-recommended ASU teacher education programs was merely a pretext for retaliation.

The board repeatedly had been made aware that the failure to approve the programs recommended by the staff would effectively terminate all of ASU's teacher education programs at the undergradute level and nearly half of its graduate programs after September 1, 1985.

The Court finds and concludes that the principal reason for the Board's failure to approve the ASU teacher education programs recommended by its staff was retaliatory. It was a rather blatant effort to punish ASU for its exercise of the fundamental right to file and prosecute a lawsuit in federal court. For reasons all too

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the Alabama Initial Teacher Certification Test. The bottom line of the Tyson Resolution requirement was summed up by Board Member Jim Allen, Jr., at the August 8 meeting: "All that Tyson calls for is for the schools to make improvements in the college of education. That's all it calls for."

obvious, the board's action, or inaction, as the case may be, cannot be allowed to stand.

The total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meanwhile, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be non-existent. The seeds of these dire consequences, having already been sown, may well bear deadly poisonous fruit prior to a decision on the appropriate relief in the main case, assuming that the plaintiffs prevail on the liability issues.

Consistent with this Memorandum of Opinion, a preliminary injunction shall issue.

DONE this 20th day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

vs.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 20, 1985]

PRELIMINARY INJUNCTION

Based on the accompanying Memorandum of Opinion and the findings of fact dictated into the record at the end of the evidentiary hearing, to preserve the court's jurisdiction and the *status quo* pending the court's decision on the merits, and upon the findings that realigned plaintiff Alabama State University and the class represented by the Knight intervenors will suffer irreparable injury in the absence of preliminary injunctive relief; that the defendant Alabama State Board of Education will not be prejudiced by the issuance of an injunction;

that realigned plaintiff and the intervenor class have shown a likelihood of success on the merits of their claims; and that the public interest will not be disserved by the issuance of an injunction, it is hereby

ORDERED, ADJUDGED, DECREED and DECLARED that upon the posting of a bond in the amount of One Hundred Dollars ($100.00) by Alabama State University and the Knight class, the defendants ALABAMA STATE BOARD OF EDUCATION, its members WAYNE TEAGUE, individually and as State Superintendent of Education, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order ARE HEREBY ENJOINED and RESTRAINED

A. From failing, at its meeting of August 22, 1985, to approve, without reservation, the following teacher education programs of Alabama State University for a period of five years:

SDE Code	CERTIFICATION LEVEL	CLASS(ES)
H5	Early Childhood Certification N3, Early Childhood Education	B, A, AA
X2	Elementary Certification (1-6) Elementary Education	B, A, AA
	N-12 Certification (N-12)	
01	Art	B
A1	Music, Instrumental	B
A0	Music, Vocal/Choral	B
B6	Physical Education	B, A, AA
H8	Learning Disabled	A
X7	Mentally Retarded	B
	High School Certification (7-12)	

SDE CODE	CERTIFICATION LEVEL	CLASS(ES)
G3	Driver and Traffic Safety	B
07	French	B
23	Spanish	B
67	Language Arts	B
06	English	B
15	Mathematics	B
21	Science, General	B
28	Biology	B
29	Chemistry	B
22	Social Science	B
40	History	B
41	Political Science	B
X5	Psychology	B
42	Sociology	B
70	Business and Office Education	B
01	Art	B
B6	Physical Education	B
	Instructional Support Personnel	
66	Principal (1-6) (7-12)	A, AA
G7, M7	Supervisor, Reading (N-12)	A

B. From failing, at its meeting of August 22, 1985, to approve the following teacher education programs of Alabama State University pending further orders of the Court:

1. Class A and Class AA Superintendent.
2. Class A and Class AA General Supervisor.

C. From taking any adverse action against Alabama State University and/or its programs or activities because of the Alabama State University's participation in this case and/or *Margaret T. Allen, etc., et al. vs. The Alabama State Board of Education, et al.*, Civil Action No. 81-697-N.

The United States Marshal for the Northern District shall effect personal service at this injunction on Dr. Wayne Teague and the State Board of Education prior to Thursday, August 22, 1985.

DONE this 20th day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 83-C-1676-S

UNITED STATES OF AMERICA,
Plaintiff,

JOHN F. KNIGHT, JR., *et al.*, individually and on behalf of others similarly situated,
Plaintiffs-Intervenors,

VS.

THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; etc., *et al.*,
Defendants.

[Filed Aug. 23, 1985]

ORDER AMENDING PRELIMINARY INJUNCTION

The Court, having been advised by the State Board of Education through its attorney that the Learning Disabled Class A Program at Alabama State University was previously approved by the State Board of Education, hereby relieves the State Board of Education of any duty to approve the said program at its August 22, 1985 meeting.

DONE this 23rd day of August, 1985.

/s/ U. W. Clemon
U. W. CLEMON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

D.C. Docket No. 83-1676

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD,* Senior District Judge.

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part; and that this cause be and the same is hereby, REVERSED in part to said district Court in accordance with the opinion of this Court;

It is further ordered that each party bear own costs.

ALLGOOD, Senior District Judge, concurred and filed an opinion.

Entered: June 6, 1986

For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: July 23, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

UNITED STATES OF AMERICA, *et al.*,
Plaintiffs-Appellees,

JOHN F. KNIGHT, JR., *et al.*,
Plaintiffs-Intervenors,
Appellees,

versus

THE STATE OF ALABAMA, *et al.*,
Defendants,

THE ALABAMA STATE BOARD OF EDUCATION;
WAYNE TEAGUE, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 6, 1986, 11 Cir. 198-, —— F.2d ——)
(July 10, 1986)

Before VANCE and JOHNSON, Circuit Judges and ALLGOOD,* Senior District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.